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81-2173
No.

In the

Supreme Court of the United States

October Term, 1981

NO.

JOHN M. GRABINSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Filed May 20, 1982.

QUESTIONS PRESENTED

1. May a defendant, before trial, appeal a federal district court's order denying his motion to dismiss criminal charges because of alleged vindictive prosecution? (The 9th Circuit holds yes; the 8th Circuit holds no.)

2. May a defendant, before trial, appeal a federal district court's order denying his motion to dismiss the information due to lack of probable cause? (The 8th Circuit holds no, while the 5th Circuit holds that this due process right is irreparably lost if a defendant is convicted.)

3. May a defendant, before trial, appeal a federal district court's order denying his motion to dismiss criminal charges because of a Speedy Trial Act violation?

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

NO.

JOHN M. GRABINSKI,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit dismissing on February 26, 1982 defendant's appeal due to lack of jurisdiction.

OPINION BELOW

Petitioner directly appealed, prior to trial, the federal district court's denial of petitioner's several pretrial motions to dismiss a criminal information. The U. S. Court of Appeals for the Eighth Circuit initially dismissed the appeal for lack of jurisdiction, but upon motion of petitioner considered the interlocutory appeal issues by rehearing en banc, and held that petitioner's claims of vindictive prosecution, due process violation (lack of probable cause), and Speedy Trial Act violation were non-appealable prior to trial, in an opinion published at 674 F.2d 677 (1982). (Appendix A) Chief Judge Lay dissented, joined by Circuit Judges Stephenson and McMillian, finding that petitioner's vindictive prosecution claim was both colorable and appealable

before a final decision on the merits of the case. Petitioner's motion for stay of issuance of the mandate, pending application for certiorari to this court was granted by the U. S. Court of Appeals for the Eighth Circuit on March 26, 1982. (Appendix B).

JURISDICTION

The judgment of the Court of Appeals was entered on February 26, 1982, which judgment was made on petitioner's Petition for Rehearing and Rehearing En Banc. Petitioner's motion to extend time to file his Petition for Writ of Certiorari to this court was granted by this court's order of April 21, 1982, extending to petitioner until May 20, 1982 in which to file this petition. This petition is timely filed, in accordance with this court's order of April 21, 1982. Jurisdiction of this court is invoked under Title 28 U.S.C.

§1254(1). See Appendix C.

QUESTIONS PRESENTED

1. May a defendant, before trial, appeal a federal district court's order denying his motion to dismiss criminal charges because of alleged vindictive prosecution?

2. May a defendant, before trial, appeal a federal district court's order denying his motion to dismiss the information due to lack of probable cause? (The 8th Circuit holds no, while the 4th Circuit holds that this due process right is irreparably lost if a defendant is convicted.)

3. May a defendant, before trial, appeal a federal district court's order denying his motion to dismiss criminal charges because of a Speedy Trial Act violation?

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States:

> ". . . and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. The Fifth Amendment to the Constitution of the United States:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . ."

STATEMENT OF THE CASE

Petitioner was initially charged by one count indictment for failure to file a federal income tax return for 1976, which indictment was returned in the Eastern District of Missouri. Because he was a resident of St. Paul, Minnesota at the time of the alleged crime, petitioner

moved to dismiss for lack of jurisdiction, or, in the alternative, for change of venue to St. Paul. His claim of jurisdictional defect was denied, but the court ordered venue to St. Paul pursuant to 18 U.S.C. §3237(b). Then on the day of trial, the trial court, on its own motion, dismissed the indictment without prejudice, finding no jurisdiction. Petitioner's pretrial claim of Speedy Trial Act violation, made also on day of trial, was not heard because of the jurisdictional defect.

Soon thereafter, prosecutor charged petitioner by information in St. Paul, adding to the 1976 count a charge of failure to file a tax return for 1975. Because the additional charge was made immediately subsequent to petitioner's exercise of his statutory venue rights, he moved the district court to dismiss

the information due to vindictive prosecution, or in the alternative for evidentiary hearing, both of which were denied. And because the information was not supported by oath, affirmation, or affidavit, petitioner moved to dismiss, or in the alternative require a probable cause hearing, or preliminary hearing. These requests were likewise denied.

Finally, petitioner argued violation of the Speedy Trial Act as to Count II of the information (tax year 1976), arguing that because the St. Louis, Missouri charge had been dismissed upon motion of the court, rather than upon petitioner's motion, the calculated time continued to run from the Missouri indictment. This motion too was denied, and petitioner filed a timely notice of appeal to the U. S. Court of Appeals for the Eighth Circuit.

By its order of May 20, 1982 (Appendix D), the Appellate Court, without opinion, dismissed the appeal for lack of jurisdiction. But the court granted petitioner's Petition for Rehearing En Banc, holding that petitioner's issues of double jeopardy (not at issue on this appeal), vindictive prosecution, due process, and speedy trial were not appealable, collateral orders. Three of the eight judges dissented, finding that defendant was entitled to pretrial appeal with regard to his claim of vindictive prosecution. See district court orders: Appendixes E and F.

REASONS FOR GRANTING THE WRIT

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1. Because of the importance of the jurisdictional question to criminal law, and because of the express conflict between the federal circuit courts, this court

should decide whether a colorable claim of "vindictive prosecution" is appealable before final decision on the merits of the case.

2. If petitioner's claim of lack of probable cause is not subject to interlocutory appeal, petitioner's right to due process will be irreparable lost under the holding of U. S. v. Millican, 600 F.2d 273 (5th Cir. 1979).

3. Because a colorable "Speedy Trial Act" violation is completely collateral to the merits of a criminal trial, and because the act mandates dismissal, an order denying a motion to dismiss due to violation of the act should be reviewed before trial.

I.

BECAUSE OF THE IMPORTANCE OF THE JURISDICTIONAL QUESTION TO CRIMINAL LAW, AND BECAUSE OF THE EXPRESS CONFLICT BETWEEN THE FEDERAL CIRCUIT COURTS, THIS COURT SHOULD DECIDE WHETHER A COLORABLE CLAIM OF "VINDICTIVE PROSECUTION" IS APPEALABLE BEFORE FINAL DECISION ON THE MERITS OF THE CASE.

In the case at bar, the Eighth Circuit has expressedly held that a claim of vindictive prosecution cannot be appealed until after final judgment on the merits, relying upon the case of U. S. v. Brizendine, 659 F.2d 215 (D.C. Cir. 1981). See also U. S. v. Gregory, 656 F.2d 1132 (5th Cir. 1981). The Ninth Circuit has taken the opposite view. U. S. v. Griffin, 617 F.2d 1342 (9th Cir.), cert. denied, 449 U.S. 863 (1980), followed in U. S. v. Wilson, 639 F.2d 500 (9th Cir. 1981) (selective prosecution).

The Eighth Circuit's reliance upon

the D. C. Circuit's Brizendine decision is somewhat misplaced, for in Brizendine the claim of vindictive prosecution was based upon plea bargaining negotiations held prior to indictment. And in Gregory, defendant failed to present elements of a colorable claim of vindictive prosecution under Blackledge v. Perry, 417 U.S. 21 (1974). Because of the factual distinctions between this case, one of post-information, colorable claim of vindictive prosecution, and Brizendine and Gregory, it is the decisions of the Eighth and Ninth Circuits that are directly at odds. (Note, however, the express criticism by the D. C. Circuit in Brizendine of the several Ninth Circuit decisions.) The issue then begs resolution by this court.

As analyzed by Chief Judge Lay in his

dissenting opinion herein, Appendix A at App. 1, once it is determined that the issue raised meets the "collateral order" criteria set forth in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-45 (1949), the question becomes whether or not the right to be free from vindictive prosecution will be irreparably lost if a defendant is not able to raise it prior to trial. Abney v. U. S., 431 U.S. 651 (1977).

Because the court recognized in Blackledge, 417 U.S. at 30, that a claim of vindictive prosecution implicates "the very power of the state to bring the defendant to court to answer the charge brought against him," a Blackledge situation should be on no less footing than an Abney, supra situation of double jeopardy, where this court recognized the

right to immediate appellate review. A claim under the double jeopardy clause of the Fifth Amendment is no more or less cognent than a claim under the due process clause of the Fifth Amendment. See also the other criminal interlocutory appeal exceptions: Stack v. Boyle, 342 U.S. 1 (1951)(excessive bail); Helstonski v. Meanor, 442 U.S. 500 (1979)(prosecution prohibited by the speech and debate clause). Compare: U.S. v. MacDonald, 435 U.S. 850 (1978)(Sixth Amendment right to Speedy Trial). DiBella v. U. S., 369 U.S. 121 (1962)(suppression of evidence).

Simply put, the three-part test of Abney allows for appeal before final judgment if:

1. The appeal completely disposes of the issue in question.

2. The issue on appeal is totally unrelated to the merits of

the case.

3. The right asserted would be irreparably lost if the appeal were delayed after final judgment.

Because it is obvious that a claim of vindictive prosecution satisfies the first two tests, petitioner turns to the question of whether or not his claim of right, under the due process clause of the Fifth Amendment against vindictive prosecution, will be irreparably lost if the issue is delayed until post-trial appeal.

Although petitioner may be vindicated by reversal of the conviction on appeal, said reversal never vindicates a defendant for the same type of anxiety recognized by the Abney court in the case of double jeopardy. See also North Carolina v. Pearce, 395 U.S. 711 (1969)(vindictive prosecution) and U. S. v. DeMarco, 550 F.2d

1224 (9th Cir.) cert. denied, 434 U.S. 827 (1977) in which the court dismissed an indictment on grounds almost identical to those asserted by petitioner. Compare: Bordenkircher v. Hayes, 434 U.S. 357 (1978).

II.

IF PETITIONER'S CLAIM OF LACK OF PROBABLE CAUSE IS NOT SUBJECT TO INTERLOCUTORY APPEAL, PETITIONER'S RIGHT TO DUE PROCESS WILL BE IRREPARABLE LOST, UNDER THE HOLDING OF U. S. V. MILLICAN, 600 F.2d 273 (5th Cir. 1979).

Petitioner was charged by information and summoned to court without affidavit of probable cause, and without any statement under oath by the charging officer. He therefore entered a special appearance, pled jurisdiction, and filed a motion to dismiss due to lack of probable cause, or in the alternative, motion for preliminary hearing, or for probable cause hearing, together with a motion to quash summons

and exonerate bond. His requested relief was summarily denied by the district court appendixes.

In Gerstein v. Pugh, 420 U.S. 103 (1975), this court rejected the notion that a prosecutor's mere decision to file an information is and of itself a probable cause determination. If a prosecutor's decision then to file an information is not sufficient for determination of probable cause for purpose of a warrant or summons, then it logically follows that it certainly would not be sufficient for determination of probable cause for purpose of the information itself. See also Albrecht v. U. S., U.S. 1 (1927) and U. S. v. Funk, 421 F.2d 452, 455 (8th Cir., 1969), Rule 9(a) of the Federal Rules of Criminal Procedure (1974 amendment) and U. S. v. Millican, 600 F.2d 273 (1979). The Funk case is not dispositive for two reasons: it was decided

before the 1974 amendment to Rule 9(a), and the defendant conceded in Funk that no preliminary hearing was required if the information was filed and supported by oath. Here the information was not supported by any oath.

In Millican, defendant raised this very issue on appeal after conviction, and the court recognized that the information without oath did not satisfy the issuance of the summons, and for that reason, defendant was denied his Fourth Amendment right against seizure of person without a showing of probable cause. But it is the Millican decision which supports petitioner's due process claim under the Fifth Amendment to the U. S. Constitution.

In Millican, the court, at 277 stated:

> For the defendant who is subsequently found guilty beyond a reasonable doubt, there is really no harm. It would be strange indeed if evidence

> sufficient to convict were found to be insufficient for probable cause. It is the defendant who is acquitted who suffers if no probable cause under oath could have been furnished by the government if it had been required before trial. That defendant has been required to suffer a trial that should not have occurred in the first place. Such a defendant should not have to disobey a summons to trigger a probable cause hearing. It is highly desirable for the district courts to establish, where it is challenged, that the government has probable cause supported by oath before putting any defendant to trial.

Because the issue is lost to a defendant who is tried and convicted, and because there is no remedy available to a defendant who is tried and acquitted, a due process right is lost irreparably to a defendant--unless he can raise the issue on appeal pretrial. The Millican court continued at 277:

> The defendant made persistent efforts to obtain a probable cause determination. He should have had

> one, or the information should have been verified. Having now been convicted beyond reasonable doubt, however, he cannot upset that conviction on the argument that no probable cause was shown prior thereto.

Likewise, this defendant, if convicted, will have no opportunity to raise the probable cause issue on appeal, and for that reason will be denied his right to due process. It is for these reasons that this somewhat unique issue, having obviously met the first two parts of the Abney test, satisfies the third Abney test of irreparable loss of a right, if not raised prior to trial. See also U. S. v. Grote, 622 F.2d 387, 1042 (5th Cir. 1980) (waiver of probable cause issue because not raised pre-trial). Compare those cases relied upon by the appellate court herein, cases which afford a convicted defendant, or a party to a civil suit, post trial remedies: Hydraulic Press Mfg. Co. v.

Moore, 185 F.2d 800 (8th Cir. 1950) (personal jurisdiction); U. S. v. Layton, 645 F.2d 21 (9th Cir. 1981) (venue); U. S. v. Layton, 645 F.2d 681 (9th Cir.), cert. denied, 101 S.Ct. 3128 (1981)(subject matter jurisdiction).

III.

BECAUSE A COLORABLE "SPEEDY TRIAL ACT" VIOLATION IS COMPLETELY COLLATERAL TO THE MERITS OF A CRIMINAL TRIAL, AND BECAUSE THE ACT MANDATES DISMISSAL, AN ORDER DENYING A MOTION TO DISMISS DUE TO VIOLATION OF THE ACT SHOULD BE REVIEWED BEFORE TRIAL.

This court found, MacDonald, supra, that a pretrial claim based upon the Sixth Amendment speedy trial clause fails the test set forth in Abney, supra. The MacDonald court accepted the Sixth Amendment analysis of Barker v. Wingo, 407 U.S. 514 (1972), considering the three evils against which the Sixth Amendment protects. Those evils and

the Sixth Amendment protection do not necessarily apply where, as here, the alleged violation is one steming from a failure of the judiciary to act according to the mandate of Congress, The Speedy Trial Act, 18 U.S.C. §3161 et.seq.

Here, the alleged violation arises from the express language of the statute itself, 18 U.S.C. §3161 et.seq., which statute mandates, beginning July 1, 1980, dismissal if the number of days permitted under the Act are exceeded. 18 U.S.C. §3162(a)(2)". . .the information or indictment shall be dismissed on motion of defendant." 18 U.S.C. §3163(c). Once it is determined that the number of days are exceeded, failure of the district court to dismiss, as required by the statute, becomes clearly erroneous as a matter of law.

This very issue of whether a Speedy Trial Act violation is appealable before final judgment was addressed in U. S. v. Mehrmanesh, 652 F.2d 766 (9th Cir. 1981), in which the court dismissed the appeal for lack of jurisdiction, and denied the petition for writ of mandamus. But see: Circuit Judge Fletcher's dissenting opinion at 652 F.2d 771. And in Mehrmanesh, the majority recognized that the issue was not one of a district court's miscounting the number of days permitted by the Act. Rather, the date of application of mandatory sanctions, and the trial court's interpretion thereof, became the main issue.

Because petitioner urges vindication of his rights under the mandatory "shall" language of the Speedy Trial Act, he presses his right to due process of law

as secured by the Fifth Amendment to the U.S. Constitution. See Abney, supra. Unlike McDonald, who sought redress concerning his Sixth Amendment right to speedy trial, petitioner urges that, as a matter of law, he has a right not to go to trial at all, and he therefore need not demonstrate prejudice. If that right is to be enjoyed at all, it must be upheld prior to trial. To provide less takes the very "teeth" from the guarantees of the act, "teeth" purposefully designed by Congress. See H. R. Report No. 93-1508, 93rd Congress, 2nd Session, reprinted in U. S. Code Cong. and Ad. News 741, 7408 (1974).

In summary, no further purpose would be served by postponing a determination of a claimed Speedy Trial Act violation, where the claim is based upon the pre-

functory deterination by a trial judge as to whether the statutory limits were exceeded. Acquittal of the defendant does not satisfy the defendant's rights under the Act, for the trial process itself denies a defendant his due process right.

CONCLUSION

For the reasons urged herein, it is respectfully requested that a Writ of Certiorari issue to review and reverse the Judgment entered herein by the U. S. Court of Appeals for the Eighth Circuit.

DATED this 19th day of May, 1982.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1812

UNITED STATES OF AMERICA,	*	
	*	On Petition for
Appellee,	*	Rehearing and
	*	Rehearing En
vs.	*	Banc
	*	
JOHN M. GRABINSKI,	*	
	*	
Appellant.	*	

Filed: February 26, 1982

Before LAY, Chief Judge, HEANEY, BRIGHT, ROSS, STEPHENSON, HENLEY, McMILLIAN and ARNOLD, Circuit Judges

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PER CURIAM.

In late 1980, defendant John M. Grabinski was indicted on a single count of failure to file income tax returns for the year 1976. The indictment was sought and returned in the Eastern District of

Missouri. Grabinski moved for a change of venue to the District of Minnesota under Fed. R. Crim P. 18 arguing that he was a resident of St. Paul, Minnesota at the time the returns at issue came due. The district court denied the motion. On March 23, 1982, however, the court, on its own motion, dismissed the case without prejudice for lack of jurisdiction.

On March 30, 1981, the government filed an information in the District of Minnesota charging defendant with two counts of failure to file, in 1975 and 1976. Defendant made various motions to dismiss among which were motions to dismiss based on the double jeopardy clause, allegations of vindictive prosecution, violation of The Speedy Trial Act, and lack of probable cause. These motions were denied.

The defendant filed a notice of appeal. This court dismissed the entire appeal for lack of jurisdiction on the ground that it was based on an interlocutory rather than a final order. Defendant then filed a petition for rehearing en banc. We grant the petition for rehearing en banc, but dismiss the appeal for lack of jurisdiction.

We hold that the orders denying defendant's motions to dismiss because of alleged vindictive prosecution, denial of a speedy trial, and lack of probable cause are not final and, therefore, are not appealable orders. We hold that a district court's order denying a defendant's motion to dismiss based on a claim of double jeopardy is appealable only if a colorable claim is made. In the present case, the order denying defendant's motion based on his claim of double jeopardy is not an appealable order

because defendant failed to present a colorable claim of double jeopardy.

Title 28 U.S.C. § 1291 (1981) provides for appeal only "from all final decisions of the district courts." This statute and its judicial application reflect a strong policy against interlocutory or "piecemeal" appeals. This policy is particularly strong in criminal prosecutions. "[T]he delays and disruption attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law." DiBella v. United States, 369 U.S. 121, 126 (1962), quoted in Abney v. United States, 431 U.S. 651, 657 (1977); see Cobbledick v. United States, 309 U.S. 323, 325 (1940).[1]

The final judgment rule is, of course, subject to a "collateral order" exception

established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949).[2]

I. Double Jeopardy.

Categories of appealable orders under Cohen must be narrowly and sharply defined. The Supreme Court has upheld use of the "collateral order" exception in criminal prosecutions in three types of cases. It has permitted interlocutory appeal of the denial of a motion to reduce excessive bail, Stack v. Boyle, 342 U.S. 1 (1951); the denial of a motion to dismiss an indictment on double jeopardy grounds, Abney; and the denial of a congressman's motion to dismiss a prosecution prohibited by the speech and debate clause, Helstoski v. Meanor, 442 U.S. 500 (1979).

In United States v. MacDonald, 435 U.S. 850, 862-63 (1978), the Supreme

Court noted that double jeopardy claims corstitute a more appropriate category of appealable orders than speedy trial claims because the nature of a double jeopardy claim "inherently limits the availability of the claim." However, a defendant must make a colorable showing of previous jeopardy and the threat of repeated jeopardy in order to state a claim of double jeopardy. If a defendant does not make a colorable showing of the elements of double jeopardy, the filing of a notice of appeal from the denial of his or her motion to dismiss should not divest the district court of jurisdiction. See Riddle v. Hudgins, 58 F. 490 (8th Cir. 1893); United States v. Hitchmon, 602 F.2d 689, 691 (5th Cir. 1979) (en banc) (notice of appeal from a nonappealable order does not render void acts of district court taken before dismissal of appeal). The

contrary rule would render the district courts powerless to prevent dilatory tactics.

The implementation of this rule requires a procedure which both respects the principal established in Abney and prevents its abuse. In Abney, the Supreme Court stated that courts of appeals have supervisory pwoer to establish procedures sufficient to strike this balance. 431 U.S. at 662 n.8. The Fifth Circuit established such a procedure in United States v. Dunbar, 611 F.2d 985, 988-89 (5th Cir. 1980). We adopt substantially the same procedure.

Henceforth, we request a district court judge who denies a motion to dismiss based on double jeopardy to make a written finding of whether the motion is frivolous or nonfrivolous. If the motion is found

to be frivolous, the filing of a notice of appeal will not divest the district court of juridiction. This court will then review the appeal on an expedited schedule. This court is already empowered to protect a defendant's rights by staying proceedings below prending disposal of an appeal. The written finding of lack of merit and the expedited review combined with existing power to issue stays should protect defendants' right not to be twice placed in jeopardy for the same crime.

In the present case, defendant argues that the filing of the two-count information in the District of Minnesota absent a written order dismissing the prior Missouri indictment subjected him to double jeopardy because the charge that he failed to file returns in 1976 was contained in both charging documents.[3] However, defendant concedes that jeopardy had not attached

under either the indictment or the information. Jeopardy does not attach until a jury is empaneled and sworn or, in a bench trial, until the judge begins to receive evidence. United States v. Martin Linen Supply Co., 430 U.S. 564, 569 (1977). This court has explicitly held that the government may obtain a second indictment prior to dismissal of a prior indictment "so long as jeopardy had not attached to any one of those indictments." DeMarrias v. United States, 487 F.2d 19, 21 (8th Cir. 1973), cert. denied, 415 U.S. 980 (1974); accord United States v. Cerilli, 558 F.2d 697, 701 (3rd Cir.), cert. denied, 434 U.S. 966 (1977). We find the defendant's appeal based on the double jeopardy clause does not state a colorable claim. Therefore, we dismiss the appeal for lack of jurisdiction.

II. Vindictive Prosecution.

Defendant argues that the filing of an information containing charges of failure to file returns in both 1975 and 1976, after he successfully asserted his right to be tried in the district where the offense was committed, Fed. R. Crim. P. 18, constituted vindictive prosecution. He alleges that the prosecutor subjected him to an increased risk by adding the count covering 1975 in order to penalize him for seeking the change of venue.

We find denial of defendant's motion to dismiss based on this claim is an interlocutory ruling. See United States v. Brizendine, 659 F.2d 215 (D.C. Cir. 1981). We hold the denial of a motion to dismiss based on a claim of vindicative prosecution cannot be appealed until a final judgment on the merits of the case is rendered.

III. Speedy Trial.

Defendant urges this court to review the denial of his motion to dismiss under The Speedy Trial Act, 18 U.S.C. § 3161 et seq. (1981). He acknowledges that the Supreme Court in MacDonald held that a speedy trial claim made under the sixth amendment was not an appealable collateral order under Cohen.

Although defendant's motion was based on The Speedy Trial Act rather than the sixth amendment, the Supreme Court's application of the Cohen criteria is still valid. The right to dismissal under the Act, like that under the sixth amendment, MacDonald, 435 U.S. at 860-61, does not embody a right not to be tried. Thus the right will not be irreparably lost if defendant cannot appeal his motion to dismiss before trial. United

States v. Mehrmanesh, 652 F.2d 766 (9th Cir. 1981); United States v. Bilsky, Nos. 81-5148 and 81-5149 (6th Cir. Nov. 24, 1981). Although the Act reduces the initial determination of whether a violation exists to a calculation of the number of days between indictment and trial which is wholly collateral to a consideration of the merits, it also provides for the exclusion of certain periods of time based on considerations related to the character of the trial. See e.g., 18 U.S.C. § 3161 (h)(8)(A)(1981). To the extent that these exceptions are involved, the order is neither final nor wholly collateral and none of the Cohen criteria is present. Mehrmanesh, 652 F.2d at 770. Thus the denial of defendant's motion to dismiss under The Speedy Trial Act is not an appealable "collateral order."

IV. Due Process

Defendant also seeks to appeal the denial of motions relating to allegations that the information was filed without an affidavit of probable cause and that he was denied a preliminary or probable cause hearing. These are precisely the type of pretrial rulings which the policy against interlocutory appeals is designed to insulate until after a decision on the merits of a case. Such rulings have uniformly been held nonappealable. See, e.g., Hydraulic Press Mfg. Co. v. Moore, 185 F.2d 800 (8th Cir. 1950) (personal jurisdiction); United States v. Layton, 645 F.2d 21 (9th Cir. 1981)(order denying change of venue); United States v. Layton, 645 F.2d 681 (9th Cir. 1981), cert. denied, 101 S.Ct. 3128 (1981) (subject matter jurisdiction); United

States v. Martin, 620 F.2d 237, 238-39, (10th Cir.), cert. denied, 101 S.Ct. 248 (1980)(venue); United States v. Sorren, 605 F.2d 1211, 1214-15 (1st Cir. 1979) (personal jurisdiction). We affirm the panel's refusal to hear defendant's due process arguments.

We therefore dismiss defendant's appeals based on the double jeopardy clause, vindictive prosecution, the due process clause, and The Speedy Trial Act for lack of jurisdiction.

HEANEY, Circuit Judge, concurring.

I concur in the court's rulings on denial of the motions based on double jeopardy, due process, and The Speedy Trial Act. I concur with the result only with respect to the vindictive prosecution issue.

LAY, Chief Judge, dissenting with whom STEPHENSON and McMILLIAN, Circuit Judges, join.

I concur in the court's rulings on denial of the motions based on double jeopardy, due process, and The Speedy Trial Act. I dissent from the ruling that the denial of defendant's motion to dismiss on the grounds of vindictive prosecution is a nonappealable order. Such an appeal, as narrowed by the facts presented here, should be allowed.

Vindictive Prosecution.

Vindictive prosecution is a relatively well-defined category of misconduct whose contours are shaped by Blackledge v. Perry, 417 U.S. 21 (1974). See also North Carolina v. Pearce, 395 U.S. 711 (1969).[4] In United States v. DeMarco, 550 F.2d 1224 (9th Cir.), cert. denied, 434 U.S. 827 (1977), the Ninth Circuit affirmed the dismissal of an indictment on grounds almost identical to those asserted in this case. In DeMarco, defendant exercised his right to request to

be tried in his home district under Fed. R. Crim. P. 21(b). This motion was granted and the prosecution subsequently obtained a new indictment which contained an additional charge. The facts underlying the additional charge were known by the government prior to the return of the first indictment. The court held that this conduct constituted vindictive prosecution. The facts presented here reveal the same type of claim.

Although the prosecution in this case did not elevate the risk by reindicting the defendant on a more serious charge for the same conduct charged in the initial information, cf. Blackledge, but rather by adding a charge, this case should be governed by the principles enunciated in Blackledge. The Supreme Court in Blackledge specifically eschewed reliance

on the double jeopardy clause. 417 U.S. at 31. Subjecting a defendant to a qualitatively increased risk after he or she has exercised a procedural right is the necessary predicate to scrutiny under Blackledge whether it be done by elevating the original charge or by other means.

But adding additional charges is different than elevating the original charge. See Hardwick v. Doolittle, 558 F.2d 292, 301-02 (5th Cir. 1977), cert. denied, 434 U.S. 1049 (1978). Prosecutors have broad discretion to decide who to prosecute and for what crimes. In United States v. Partyka, 561 F.2d 118 (8th Cir. 1977), cert. denied, 434 U.S. 1037 (1978), this court stated:

> [W]e do not read Perry as taking from prosecutors their traditional and proper discretion in deciding which of multiple possible charges against a defendant who are to be prosecuted or whether they are all

> to be prosecuted at the same time. Cf. United States v. Crow Dog, 532 F.2d 1182, 1195-96 (8th Cir. 1976), and cased cited. See also United States v. Lovasco, supra, 431 U.S. at 794, 97 S.Ct. at 2051, n.15.
>
> . . . .
>
> If it be assumed that in some cases in which a successful defense maneuver is met by the filing of additional charges challenged as vindictive, the prosecution may have a duty to negative the idea of vindictiveness, [the presumption of vindictiveness is refuted by the prosecution's revelation of legitimate factors underlying its exercise of discretion].

Id. at 124.

The addition of charges after defendant exercises a procedural right gives rise to a presumption of vindictiveness, but there is a wider variety of legitimate reasons for the addition of a charge than for the state's action in a pure Blackledge situation. The presumption of vindictiveness is thus more easily refuted in the type of situation at issue

in this case.

Appealability.

The Supreme Court has not ruled on the appeabability of a denial of a motion to dismiss based on prosecutorial vindictiveness. The Ninth Circuit Court of Appeals held that such orders are appealable. United States v. Griffin, 617 F.2d 1342 (9th Cir.), cert. denied, 449 U.S. 863 (1980). Two other circuits have addressed the issues, but neither confronted allegations which presented a prima facie case of vindictive prosecution. In United States v. Brizendine, 659 F.2d 215 (D.C. Cir. 1981), the District of Columbia Circuit refused to entertain an appeal from the denial of a motion to dismiss based on alleged prosecutorial vindictiveness. But the conduct alleged to establish vindictiveness occurred during

plea bargaining prior to indictment. The defendants, officers of McDonnell Douglas Corporation, argued that the government sought to indict them only after McDonnell Douglas refused to accept a plea bargain. Rules governing the fluid process of bargaining differ from those applicable to latter stages of the prosecution. Compare Bordenkircher v. Hayes, 434 U.S. 357 (1978) (explicitly distinguishing Pearce and Blackledge) with Blackledge. In Brizendine, there were no initial stakes established which were elevated after defendants exercised some right. The court specifically states that it need not decide whether an appeal would lie in a true Blackledge situation. Brizendine, 659 F.2d at 221.

In United States v. Gregory, 656 F.2d 1132 (5th Cir. 1981), the Fifth Circuit

also refused to entertain an appeal from the denial of a motion to dismiss based on alleged prosecutorial vindictiveness. But the defendants in Gregory failed to allege the elements of a claim under Blackledge. They simply asserted that the prosecutor indicted them because he was "after" them. Gregory at 1135. The Fifth Circuit also explicitly states, "There may be vindictiveness claims, of course, which by their very nature would be destroyed if an appeal was delayed." Id. at 1136.

Given the lack of binding precedent, we must analyze the appealability of the denial of defendant's motion to dismiss on the grounds of vindictive prosecution using the Cohen criteria. 337 U.S. at 546. First, the district court's order was a final disposition of the issue. The question of vindictive prosecution has been fully and finally answered by the

trial court. Second, the denial of the motion was not simply an element of the yet unmade decision on the merits. The issue of vindictive prosecution, as under Blackledge, is wholly collateral to the merits of the case. The only questions are whether defendant has demonstrated a prima facie case of vindictiveness and whether the government has adequately justified its actions. These questions are wholly unrelated to a determination of defendant's guilt.

The difficult question is whether the right to be free from vindictive prosecution will be irreparably lost or infringed if it is not vindicated before the trial commences. In Blackledge, the Court held that the vindictive prosecution claim implicated "the very power of the State to bring the defendant to court to answer the charge brought against him."

417 U.S. at 30.[5] The Supreme Court explicitly stated that the defendant's right to be free of vindictive prosecution is a "right not to be haled into court at all upon the felony charge." Id. "The very initiation of the proceedings against him in the Superior Court thus operates to deny him due process of law." Id. at 30-31; see Abney, 431 U.S. at 659-60 (citing Blackledge).

The Blackledge decision was thus rooted in a desire to prevent fear of vindictiveness from chilling defendants' exercise of their rights. Even if a conviction is subsequently reversed, the anxiety produced by the increased risk involved in standing trial on the new charges and the added expense and difficulty of defending against the charges would deter defendants from

utilizing procedural rights. It is the state's power to harass a defendant--"subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty," Green v. United States, 355 U.S. 184, 187-88 (1957)(Justice Black describing purpose of double jeopardy clause)--which underlies the prohibition against twice placing an individual in jeopardy. The same concerns govern a claim of vindictive prosecution under the facts of Blackledge. Although the remedy for violation of many rights is dismissal and thus granting the remedy before trial would eliminate the burdens of standing trial, the eliminiation of the costs and anxieties of trial would be incidental to

the vindication of these rights. See MacDonald, 435 U.S. at 860 n.7. But in the case of vindictive prosecution, the state must be prevented from imposing these burdens in order to vindicate the policy underlying the vindictive prosecution decisions. I therefore conclude that the denial of a motion based on a claim of vindictive prosecution under Blackledge is a collateral order under Cohen and thus is appealable before a final decision on the merits of the case.[6]

A true copy

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[1]A principal goal underlying the doctrine of finality is the sixth amendment guarantee of a speedy trial. United States v. MacDonald, 435 U.S. 850, 861 (1978). Promiscuous resort to interlocutory appeal would also eviscerate the

independence and power of district court judges. See Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981).

[2]Cohen defined appealable collateral orders using three criteria which were summarized in Abney:

> First, the District Court's order had fully disposed of the question of the state security statute's applicability in federal court; in no sense, did it leave the matter 'open, unfinished or inconclusive.' [Cohen, 337 U.S. at 546]. Second, the decision was not simply a 'step forward final disposition of the merits of the case [which would] be merged in final judgment'; rather, it resolved an issue completely collateral to the cause of action asserted. Ibid. Finally, the decision had involved an important right which would be 'lost, probably irreparably,' if review had to await final judgment; hence, to be effective, appellate review in that special, limited setting had to be immediate. Ibid.

Id., 431 U.S. at 658.

[3]The record reveals that the original indictment was orally dismissed on March 23, 1981 (the order was filed on June 10, 1981) and that the latter information was not filed until March 30, 1981.

[4]In Blackledge, the defendant invoked his statutory right to a trial de novo in

superior court after he was charged with and convicted of a misdemeanor. The prosecution then indicted him on a felony charge based on the same underlying conduct. The court held that these facts created a presumption of vindictiveness even in the absence of direct evidence of retaliatory motivation. 417 U.S. at 27-28. Because the prosecution failed to rebut the presumption with evidence that intervening events justified its action, the presumption stood and the indictment was dismissed. Id. at 29 n.7.

[5]In Blackledge, the defendant pled guilty to the second charge. Thus the Court had to decide whether vindictive prosecution implicated the state's power to bring the defendant into court or whether it was a defect which could be waived, like other violations of constitutional rights by the entry of a guilty plea. See Tollett v. Henderson, 411 U.S. 258 (1973).

[6]The procedure by which we request the district court to certify whether a motion to dismiss based on the double jeopardy clause is frivolous or not should also apply to interlocutory appeals based on allegations of vindicative prosecution. I emphasize that only colorable claims of vindictive prosecution within the confines of the principles articulated in Blackledge--claims revealing the assertion of a procedural right and a prosecutor's consequent elevation of defendant's risk--give rise to an appealable order.

In the event the district court indicates that a motion to dismiss is frivolous, this court should entertain the request for stay only through application for a writ of mandamus.

I also feel that motions to dismiss on grounds of either double jeopardy or vindictiveness in prosecution should be made by a defendant at the earliest possible time after indictment. Timeliness of the motion to dismiss may be a substantial factor in this court's decision to stay the proceedings in the district court pending disposition of the appeal. See United States v. Wilson, 639 F.2d 500, 502 n.1. (9th Cir. 1981) (noting that filing of frivolous motions alleging vindictive prosecution has caused delay in the Ninth Circuit).

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1812. September Term, 1981

United States of America, Appellee,	) Appeal from the United States District Court for the District of Minnesota.
vs.	)
John M. Grabinski, Appellant.	)

On motion of appellant, it is now here ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of sixty days from this date. If within that time there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for writ of certiorari has been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

March 26, 1982

APPENDIX C

SUPREME COURT OF THE UNITED STATES

No. A-892

JOHN M. GRABINSKI,

Petitioner

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 20, 1982.

/s/ Harry A. Blackmun
Associate Justice of the
Supreme Court of the
United States

Dated this 21st day
of April, 1982.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 81-1812

United States of America, Appellee, vs. John M. Grabinski, Appellant.	* * * * * * * * *	Appeal from the United States District Court for the District of Minnesota

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Filed: September 3, 1981

O R D E R

The pretrial orders[1] appealed from in the above case are not final judgments as required by 28 U.S.C. § 1291; nor is the "collateral order doctrine" of Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), applicable to the factual

situation herein presented. The appeal is therefore dismissed for lack of jurisdiction. The mandate of this court shall issue forthwith.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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[1]Among those were motions to: (a) dismiss for selective and discriminatory prosecutions, (b) suppress certain evidence, and (c) dismiss Count II for failure to comply with the Speedy Trial Act.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA, 3-81 Cr. 35

Plaintiff, MEMORANDUM ORDER

vs.

JOHN M. GRABINSKI,

Defendant.

This matter comes before the court upon the "Defendant's Objection and Appeal to the Magistrate's Order and Report and Recommendation" and the "Defendant's Motion for Reconsideration of Court's Order of June 23, 1981." . . .

Order of the United States Magistrate

1. Motion to quash summons and exonerate bond

The order of the Magistrate denying the motion is in all things confirmed. . .

Report and Recommendation of United States Magistrate . . .

2. Motion to Dismiss Information Due to Lack of Probable Cause, or in the Alternative, Motion for Preliminary Hearing

The motion is in all things denied. . .

8. Motion to Dismiss for Improper Form of Charge

The motion is in all things denied.

9. Motion to Dismiss Due to Vindictive Prosecution by the Government . . .

Report and Recommendation

. . .

3. Defendant's Motion to Dismiss Count II for Failure to Comply with Speedy Trial

The defendant's motion to dismiss for failure to comply with the Speedy Trial Act or failure to afford a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution is in all things denied. . . .

DATED: July 23, 1981.

/s/
Donald D. Alsop
United States District Judge

. . .

APPENDIX F

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATE OF AMERICA, 3-81 Cr. 35

Plaintiff,

v. ORDER

JOHN M. GRABINSKI,

Defendant.

The above-entitled matter comes before the court upon the Report and Recommendation of Magistrate Brian P. Short dated June 2, 1981. That report contains a comprehensive summary and analysis, together with a recommendation, as regards the following three motions of the defendant, to-wit:

. . .

3. Defendant's motion to dismiss Count II for lack of speedy trial under Sixth Amendment to the United States

Constitution and the Speedy Trial act, 18 U.S.C. § 3161, et. seq.

No objections to or appeals from the recommendations of the Magistrate have been filed by or on behalf of the defendant.

Based upon this court's review of the file and the Report and Recommendation of the Magistrate dated June 2, 1981, which report the court adopts,

. . .

IT IS FINALLY ORDERED That the defendant's motion to dismiss for failure to comply with the Speedy Trial Act or failure to afford a speedy trial as guaranteed by the Sixth Amendment of the United States Constitution be and the same hereby is in all things denied.

DATED: June 23, 1981.

/s/
Donald D. Alsop
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari by depositing the same in the United States Mail, Phoenix, Arizona, with sufficient airmail postage prepaid affixed thereto, addressed to:

Solicitor General
Department of Justice
Washington, D.C. 20530

Ms. M. Susan Murname
14 East Walnut Street
Alexandria, Virginia 22301

this 20th day of May, 1982.

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JOHN M. GRABINSKY